

NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,

NEW DELHI

Comp. App. (AT) (Ins) No. 1488 of 2022 & I.A. No. 4701 of 2022

IN THE MATTER OF:

Rajib Biswas & Anr.

...Appellant

Versus

Arena Superstructures Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellant : Ms. Pooja M. Sehgal, Mr. Prashant Jain, Ms. Atrayei Ghosh, Mr. Subham Paliwal, Ms. Nitya Prabhakar, Advocates

For Respondent : Mr. Prithu Garge, Mr. Parth B., Advocates

O R D E R

Per: Justice Rakesh Kumar Jain: (Oral)

19.10.2023: This appeal is directed against the order dated 11.10.2022 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) on an application bearing I.A. No. 934 of 2022 filed in (IB)-875(PB)/2020 by the present Appellants for seeking a direction to the Resolution Professional to ensure refund to the applicants and the similarly placed decree holders, has been disposed of.

2. Shorn of unnecessary details, the Appellants (two in number) booked units in the project (Lotus Arena) floated by M/s Arena Superstructures Pvt. Ltd. (Corporate Debtor) in Sector 79, Noida. The Appellants approached UP RERA for the refund of the amount. In the case of Sh. Rajib Biswas (appellant no. 1) the recovery certificate was issued on 07.02.2020 for an amount of Rs. 76,53,746.09/- and in the case of Sunil Dwivedi (appellant no. 2) the recovery certificate was issued on 13.02.2020 for an amount of Rs. 47,46,880.68/-.

3. It is stated that the amount of Rs. 80,37,363 in respect of Appellant No. 1 and the amount of Rs. 49,58,844 in respect of Appellant No. 2 is stated to have been admitted. The Application filed by the Appellants did not find favour with the Adjudicating Authority only on the ground that “1. The applicants filed the claim before the RP as a Real Estate Allottee and he was treated as such. The home buyers have been represented by the authorised representative who voted in favour of the plan and therefore, there is no question of dissent by 6 people amongst class. Even otherwise there is no proof of such dissent on record. 2. The decision of Deepak Khanna's case does not apply here, as in that case the RP treated the applicants as financial creditors and not as home buyers of a class. The applicants on their own plea of Real Estate Allottee having become part of the home buyers in a class duly represented by an authorised representative cannot now plead otherwise and seek for refund.”

4. The Adjudicating Authority has also referred to Para 273.9 of the Judgment of the Hon'ble Supreme Court in the case of Jaypee Kensington Vs. NBCC India & Ors. 2022 (1) SCC Page 401. The said paragraph is also reproduced as under:-

“the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016 does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for

the reason that the same has been completed or is nearing completion.”

5. Opening her argument, Counsel for the Appellants has relied upon a decision of the Hon’ble Supreme Court in the case of Vishal Chelani & Ors. Vs. Debashis Nanda, 2023 SCC OnLine SC 1324 which read as under:-

“In view of the foregoing reasons, the impugned order is hereby set aside; the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority.”

6. It is thus submitted that in that case also it was an issue regarding refund of home buyers who had obtained a decree from the RERA and it has been held that the said home buyers are to be treated equally with other home buyers/financial creditors. She has then referred to relevant portion of the resolution plan much less Clause (B3) Cancellation, Termination and Forfeiture (C) which read as under:-

“In case an Allottee wishes to voluntarily cancel his booking in the Project and seek refund of money from the CD, such Allottee will be refunded the amount deposited by him with the Corporate Debtor deducting an amount equivalent to 10% of the Basic Sale Price of the flat as per the BBA. In case the amount to be deducted the amount deposited by such Allottee with the Corporate Debtor, then no payment will be made to such Allottee nor will be demanded from such Allottee. The refund will be made in the 48th month from the Transfer Date, or within 60 days from the sale of the concerned flat, whichever is earlier. This payment will not carry any interest.”

7. It is contended that the Appellants are entitled to the decretal amount rather the amount which has been admitted by the RP.

8. On the other hand, Counsel appearing on behalf of Respondent No. 3 has submitted that firstly, resolution plan has been approved by the Adjudicating Authority on 19.07.2023 and as per his information, the Appellants have not challenged the same. Secondly, there is no error in the impugned order and thirdly, even the application filed by the Appellant has become infructuous by virtue of the prayer made in the application. In this regard, he has referred to prayer (b) of the application which read as under:-

“Pass directions to Resolution Professional to ensure the provision of a refund to the applicants and the similarly placed decree holders.”

9. In this regard, it is submitted that there is already a provision made in the resolution plan about such refund which has already been referred to in earlier part of this order and the resolution applicant is bound by it. He has also submitted that the Judgment relied upon by the appellants in the case of Vishal Chelani & Ors. (Supra) is the answer to the question which has been raised by the Appellants herself against her because person similar to the appellant in the case of Vishal Chelani & Ors. (Supra) has been held to be treated equal to the other homebuyers/financial creditors and no special treatment was to be given to the Appellants for the purpose of seeking relief in the present application.

10. We have heard Counsel for the parties and after perusal of record are of the considered opinion that the very fact that the Appellants have obtained a decree from UP RERA and the issue decided in the case of Vishal Chelani & Ors. (Supra) was whether they form a separate class has been decided that they are also to be treated as such alongwith other home buyers/financial

creditors for the purpose of resolution plan and the argument raised by the Respondent that a provision has already been made in the resolution plan for the purpose of refund in Clause (B3)(c), we do not find any error in the impugned order and thus the present appeal is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sheetal/Ravi